

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHARLES JEROME DOUGLAS,

Defendant-Appellant.

UNPUBLISHED

August 7, 2014

No. 315027

Wayne Circuit Court

LC No. 12-010051-FH

Before: JANSEN, P.J., and SAAD and DONOFRIO, JJ.

PER CURIAM.

Defendant appeals by right his jury-trial convictions of possession of a firearm by a felon (felon-in-possession), MCL 750.224f, carrying a concealed weapon (CCW), MCL 750.227, and possession of firearm during the commission of a felony (felony-firearm), second offense, MCL 750.227b. Defendant was sentenced as a fourth habitual offender, MCL 769.12, to 2 to 10 years in prison for the felon-in-possession and CCW convictions, and five years in prison for the felony-firearm conviction. We affirm.

On October 9, 2012, at about 12:00 a.m., Detroit Police Officers Ibrahimovic and Lewis were on patrol in the area of 19410 St. Marys Street in Detroit. When the officers heard gunshots, they canvassed the area and saw defendant walking in the middle of the street. When defendant began running, Ibrahimovic and Lewis chased him on foot to the rear of a home on St. Marys Street. Ibrahimovic saw defendant pull out a silver handgun and toss it over a six-foot wooden fence. While Ibrahimovic retrieved the handgun, Lewis and Detroit Police Department (DPD) Sergeant Michael Osman apprehended defendant. DPD Sergeant Todd Eby sent the gun to the Michigan State Police (MSP) crime lab for testing, but because the gun “was stuck in back-log” at the lab due to higher-priority requests from homicide cases, it was not available for defendant’s trial.

Defendant first argues that his trial attorney rendered ineffective assistance of counsel when she did not mention a particular discrepancy in the officers’ testimony during cross-examination or make reference to it during her closing argument. We disagree.

To preserve a claim of ineffective assistance of counsel, the defendant must move, in the trial court, for a new trial or an evidentiary hearing under *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). *People v Payne*, 285 Mich App 181, 188; 774 NW2d 714 (2009). Defendant did not move for a new trial or seek a *Ginther* hearing in the trial court. Therefore,

defendant's claim of ineffective assistance of counsel is not preserved for appeal. "Unpreserved issues concerning ineffective assistance of counsel are reviewed for errors apparent on the record." *People v Lockett*, 295 Mich App 165, 186; 814 NW2d 295 (2012).

Criminal defendants have a right to the effective assistance of counsel under the United States and Michigan Constitutions. US Const, Am VI; Const 1963, art 1, § 20; *United States v Cronin*, 466 US 648, 654; 104 S Ct 2039; 80 L Ed 2d 657 (1984); *People v Vaughn*, 491 Mich 642, 669; 821 NW2d 288 (2012). To establish that a defendant's trial counsel was ineffective, a defendant must show that (1) counsel's performance was below an objective standard of reasonableness under prevailing professional norms and (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Strickland v Washington*, 466 US 668, 688; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *Lockett*, 295 Mich App at 187. Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *Vaughn*, 491 Mich at 670. Moreover, there is a strong presumption that counsel's assistance constitutes sound trial strategy. *People v Armstrong*, 490 Mich 281, 290; 806 NW2d 676 (2011). Decisions regarding what evidence to present and which issues to raise during closing argument are presumed to be matters of trial strategy. *People v Russell*, 297 Mich App 707, 716; 825 NW2d 623 (2012).

Defendant argues that, because there was no physical evidence introduced at trial in the form of the gun that he was charged with possessing, the jury was left to consider only the credibility of the officers. He asserts that his attorney was ineffective because she failed to cross-examine Ibrahimovic and Lewis about a singular discrepancy in their testimony or refer to it during her closing argument. This alleged "glaring discrepancy" involves Ibrahimovic's testimony that, as he and Lewis initially pulled up near defendant, when Ibrahimovic asked defendant whether he had heard any shots fired in the area, defendant looked at Ibrahimovic and "began running westbound between the houses." In contrast, Lewis later testified that defendant was "running eastbound."

The record shows that Ibrahimovic was otherwise subjected to cross-examination on various points by defendant's lawyer. During one such exchange, defendant's lawyer successfully impeached Ibrahimovic's credibility by pointing out an overt inconsistency between his direct testimony at trial and his earlier, preliminary examination testimony, regarding whether defendant was wearing a coat on the night of the incident. Defense counsel also challenged Ibrahimovic's ability to observe in the midnight lighting conditions, and attempted to impeach Ibrahimovic's testimony concerning whether he actually saw the gun under defendant's clothing during the short chase. Lewis was likewise subjected to cross-examination by defendant's lawyer, who challenged Lewis's perception of events and failure to interview the homeowner on the adjoining property where the gun was found. Defense counsel thus had a presumptively sound strategy to seek to undermine the credibility of Ibrahimovic and Lewis.

The record further shows that, in her closing argument, defense counsel challenged the credibility of Ibrahimovic, Lewis, and Osman when she asked rhetorically, "Can we really count on what they said?" In light of the officers' otherwise nearly consistent testimony, however, it was sound trial strategy for defense counsel to focus her closing argument on the lack of physical evidence, including the prosecution's failure to produce the gun, any fingerprints, or the lack of a complete investigation that might have included an interview with the neighbor. *Russell*, 297

Mich App at 716. This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *Payne*, 285 Mich App at 190. We perceive no errors on the existing record. See *Lockett*, 295 Mich App at 187. Defendant has failed to establish a reasonable probability that the outcome of his trial would have been different in the absence of counsel's allegedly deficient performance.

Defendant next argues that the trial court improperly assessed 10 points when scoring offense variable (OV) 13. We agree that the trial court erred, but conclude that defendant is not entitled to resentencing.

To be preserved for appellate review, a challenge to the scoring of the sentencing guidelines must have been raised at sentencing, in a proper motion for resentencing, or in a proper motion to remand filed in this Court. MCL 769.34(10); MCR 6.429(C); *People v Jones*, 297 Mich App 80, 83; 823 NW2d 312 (2012). Because defendant did not so challenge the scoring of OV 13, this issue is not preserved for appeal. However, this Court may review an unpreserved scoring issue for plain error affecting defendant's substantial rights. *People v Loper*, 299 Mich App 451, 457; 830 NW2d 836 (2013).

OV 13 addresses a continuing pattern of criminal behavior. MCL 777.43; *People v Gibbs*, 299 Mich App 473, 487; 830 NW2d 821 (2013). Under MCL 777.43(1)(d), the trial court may assess 10 points for OV 13 if "the offense was part of a pattern of felonious criminal activity involving a combination of 3 or more crimes against a person or property or a violation of MCL 333.7401(2)(a)(i) to (iii) or section MCL 333.7403(2)(a)(i) to (iii) of the Public Health Code" Under MCL 777.43(1)(g) the trial court must assess zero points for OV 13 if "no pattern of felonious criminal activity existed."

When scoring OV 13, all crimes within a five-year period, including the sentencing offense, must be counted, regardless of whether the offense resulted in a conviction. MCL 777.43(2)(a); *People v Earl*, 297 Mich App 104, 110; 822 NW2d 271 (2012). But only those crimes that occurred within the five-year period encompassing the sentencing offense may be considered. *People v Francisco*, 474 Mich 82, 86; 711 NW2d 44 (2006). The circuit court's findings of fact must be supported by a preponderance of the evidence. *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013).

Defendant was assessed 10 points for OV 13. Taken together with defendant's other Prior Record Variable (PRV) and OV scores, this placed him in cell D-II on the sentencing grid for Class E felonies, with a recommended minimum sentence range of 7 to 46 months. MCL 777.66; see also MCL 777.21(3)(c). However, defendant's Presentence Investigation Report (PSIR) reveals that, beyond the current offenses, he had no felony convictions within the five years immediately preceding the instant offenses that could properly be scored under OV 13. Further, the sentencing offense of felon-in-possession is classified as a crime against public safety, as is the offense of CCW, and the sentencing guidelines do not apply to the offense of felony-firearm. MCL 777.16m. Because defendant's instant convictions of felon-in-possession and CCW were for crimes against public safety, and his prior convictions were outside the five-year period immediately preceding the sentencing offense, no points should have been assessed for OV 13.

A reduction in points from 10 to zero for OV 13 would change defendant's recommended minimum sentence range. Had the trial court properly assessed zero points for OV 13 in this case, defendant would have been placed in cell D-I rather than cell D-II on the sentencing grid for Class E felonies. This would have resulted in a recommended minimum sentence range of 5 to 46 months instead of 7 to 46 months. MCL 777.66; see also MCL 777.21(3)(c). In general, a defendant is entitled to resentencing on the basis of a scoring error if the error changes the recommended minimum sentence range under the legislative guidelines. *Francisco*, 474 Mich at 89 n 8.

In this case, however, the trial court's scoring error does not warrant resentencing. Defendant cannot establish that the trial court's unpreserved scoring error resulted in prejudice or otherwise affected his substantial rights. Defendant received a minimum sentence of 24 months—well within the correct minimum sentence range of 5 to 46 months. Moreover, there is no indication that the trial court would have imposed a shorter minimum sentence had the guidelines been scored correctly. *Id.* “A party shall not raise on appeal an issue challenging the scoring of the sentencing guidelines or challenging the accuracy of information relied upon in determining a sentence that is within the appropriate guidelines sentence range unless the party has raised the issue at sentencing, in a proper motion for resentencing, or in a proper motion to remand filed in the court of appeals.” MCL 769.34(10). If a defendant has failed to preserve his challenge to the trial court's scoring decision, and his sentence is within the appropriate guidelines range, “the defendant cannot raise the error on appeal except where otherwise appropriate, as in a claim of ineffective assistance of counsel.” *Francisco*, 474 Mich at 89 n 8. We therefore conclude that defendant is not entitled to be resentenced. *Id.*

In a supplemental brief filed *in propria persona*, defendant argues that because no physical evidence was presented to the jury at trial, there was insufficient evidence to establish that he possessed the gun and to convict him of the charged offenses. We disagree.

“Criminal defendants do not need to take any special steps to preserve a challenge to the sufficiency of the evidence.” *People v Cain*, 238 Mich App 95, 116-117; 605 NW2d 28 (1999). In a criminal case, due process requires that a prosecutor introduce evidence sufficient to justify a trier of fact in concluding that the defendant is guilty beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999); *People v Harverson*, 291 Mich App 171, 175; 804 NW2d 757 (2010). We review the evidence de novo in a light most favorable to the prosecutor to determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Reese*, 491 Mich 127, 139; 815 NW2d 85 (2012); *People v Ericksen*, 288 Mich App 192, 196; 793 NW2d 120 (2010).

We do not interfere with the factfinder's role in determining the weight of the evidence or the credibility of the witnesses. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748, amended 441 Mich 1201 (1992); *People v Eisen*, 296 Mich App 326, 331; 820 NW2d 229 (2012). Questions of credibility are left to the trier of fact. *People v Harrison*, 283 Mich App 374, 378; 768 NW2d 98 (2009). “Circumstantial evidence and the reasonable inferences that arise from the evidence can constitute satisfactory proof of the elements of a crime.” *People v Allen*, 201 Mich App 98, 100; 505 NW2d 869 (1993).

The elements of felon-in-possession are: (1) the defendant possessed a firearm, (2) the defendant was previously convicted of a felony, and (3) the defendant's right to possess a firearm has not been restored. MCL 750.224f; see also *People v Perkins*, 473 Mich 626, 630-631; 703 NW2d 448 (2005). The elements of felony-firearm are: (1) the defendant possessed a firearm, (2) during the commission of, or attempt to commit, a felony. *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999). To prove the offense of CCW, the prosecution must show that the defendant knowingly possessed a concealed weapon without a license. MCL 750.227; see also *People v Hernandez-Garcia*, 477 Mich 1039, 1040 n 1 (2007). Possession of a firearm can be actual or constructive, and can be shown by direct or circumstantial evidence. *People v Johnson*, 293 Mich App 79, 83; 808 NW2d 815 (2011).

The evidence supporting defendant's convictions of felon-in-possession, CCW, and felony-firearm came from the testimony of Ibrahimovic, Lewis, and Osman. Ibrahimovic and Lewis testified that they saw defendant flee, grab his waistband, run up a driveway off St. Marys Street, reach into his waistband, pull out a gun, and throw it over a nearby fence. All three officers testified that the gun they saw defendant throw was recovered from the area of the fence. Osman corroborated the testimony of Ibrahimovic and Lewis in this regard. The jury, as the trier of fact, found the three police eyewitnesses credible and chose to believe their testimony. See *Harrison*, 283 Mich App at 378.

In addition, there was other circumstantial evidence of defendant's guilt of the crimes charged. All three police witnesses testified that defendant "took off running" upon seeing them and being asked about the gunfire. Flight can constitute evidence of a defendant's consciousness of guilt. *People v Unger*, 278 Mich App 210, 226; 749 NW2d 272 (2008). Further, Lewis testified that when he searched defendant incident to his arrest, he found a plastic baggie with five live rounds of ammunition that matched the round Lewis found in the gun. Defendant's possession of ammunition matching the round taken from the gun that he was seen throwing, and later recovered by the police, was circumstantial evidence that defendant had possessed the gun. See *United States v Prudhome*, 13 F3d 147, 149 (CA 5, 1994) (holding that a reasonable jury could have inferred that the defendant knowingly possessed the firearm in question from the fact that the defendant "had three rounds of matching ammunition in his waist pouch"). We conclude that the prosecution presented sufficient evidence to support defendant's convictions of felon-in-possession, CCW, and felony-firearm.

Defendant next argues that the prosecutor committed misconduct by failing to produce the firearm at trial and provide it to the defense. Again, we disagree.

To preserve an issue of prosecutorial misconduct, a defendant must contemporaneously object and request a curative instruction. *People v Bennett*, 290 Mich App 465, 475; 802 NW2d 627 (2010); *Unger*, 278 Mich App at 235. No contemporaneous objection was made to the prosecutor's failure to produce the actual firearm at trial. Therefore, this issue is not preserved. *Id.* Our review is thus limited to ascertaining whether there was plain error that affected the defendant's substantial rights. *Id.*; see also *People v Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008). The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007). Prosecutorial misconduct issues are decided on a case-by-case basis, and the reviewing court must examine the record in context. *People v Mann*, 288 Mich App 114, 119; 792 NW2d 53 (2010).

The prosecution's suppression of evidence favorable to the accused violates due process when the evidence is material to guilt or punishment, irrespective of the good faith or bad faith of the prosecution. *People v Banks*, 249 Mich App 247, 254-255; 642 NW2d 351 (2002); see also *Brady v Maryland*, 373 US 83, 87; 83 S Ct 1194; 10 L Ed 2d 215 (1963).

Defendant contends that the failure produce the actual firearm at trial constituted prosecutorial misconduct. The record shows that the pistol was sent to the MSP crime lab for testing, but that it "was stuck in back-log" and not available to be produced at defendant's trial. The prosecution's failure to produce the gun cannot fairly be called "suppression" of that evidence. Moreover, even if the gun had been produced, it could hardly be considered "favorable to the accused." *Banks*, 249 Mich App at 254-255. Indeed, the physical evidence would have further corroborated the testimony of the police witnesses. We cannot conclude that the prosecutor's failure to produce the actual firearm at trial violated defendant's right to due process. *Id.*

In addition, we note that defense counsel made no contemporaneous objection to the prosecutor's failure to produce the firearm at trial; nor did defense counsel ask for a curative instruction. See *Bennett*, 290 Mich App at 475. Such a curative instruction could have alleviated any prejudice here. *Unger*, 278 Mich App at 235. The prosecutor's failure to produce the firearm at trial did not rise to the level of outcome-determinative plain error. See *id.*

Affirmed.

/s/ Kathleen Jansen
/s/ Henry William Saad
/s/ Pat M. Donofrio